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Nos. 04-1528 et al.

IN THE

Supreme Court of the United States

NEIL RANDALL *et al.*,
Petitioners/Cross-Respondents,

v.

WILLIAM H. SORRELL *et al.*,
Respondents/Cross-Petitioners.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF UNITED STATES SENATOR MITCH McCONNELL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Vermont's limits on candidate expenditures and campaign contributions are unconstitutional infringements on essential First Amendment freedoms.

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BRIEF OF UNITED STATES SENATOR MITCH McCONNELL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The question presented in this case is whether the First Amendment prohibits Vermont from placing severe restrictions on candidate expenditures and campaign contributions. The First Amendment is essential to the vitality and legitimacy of our political process. *Amicus*—a long-time advocate of First Amendment protection for political speech, and an official elected to federal office with a vital personal stake in the health of our political system—has a significant interest in the resolution of this question.

United States Senator Mitch McConnell is the senior United States Senator from the Commonwealth of Kentucky and the Senate Majority Whip. He is also the former chairman and a current member of the Senate Rules and Administration Committee, which is the committee responsible for reviewing all proposed legislation related to federal elections. During his four terms in the Senate, Senator McConnell has been one of the Senate's foremost champions of vigorous political debate and has consistently argued that restrictions upon free speech are constitutionally doubtful and will undermine popular participation in government. *See, e.g.*, Mitch McConnell, *In Defense of Soft Money*, N.Y. TIMES, Apr. 1, 2001, § 4, at 17; Mitch McConnell, *"Reform" Hurts Freedoms*, USA TODAY, Mar. 23, 2001, at A16.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or his counsel made a monetary contribution to the preparation or submission of this brief.

Senator McConnell's strongly held beliefs about the meaning of the First Amendment and the importance of robust political debate led him to challenge the constitutionality of the Bipartisan Campaign Reform Act of 2002 shortly after its enactment. *See McConnell v. FEC*, 540 U.S. 93 (2003). He also has participated as *amicus curiae* in several other cases contesting the validity of restrictions on political speech.[2] Senator McConnell's position as a United States Senator and his extensive experience with campaign finance legislation give him unique insight into the constitutional infirmities presented by the 1997 Vermont Campaign Finance Reform Act.

STATEMENT

1. All campaign finance restrictions are constitutionally suspect, because political speech is at the heart of the First Amendment. *Meyer v. Grant*, 486 U.S. 414, 425 (1988). In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that the government's generalized interest in removing corruption and the appearance of corruption from politics can support restrictions on campaign *contributions*, but is insufficient to justify limitations on candidate *expenditures*. *Id.* at 55. As the Second Circuit recognized, Vermont lawmakers passed the 1997 Vermont Campaign Finance Reform Act ("Act 64"), Vt. Stat. Ann. tit. 17, §§ 2801-2883, with the specific intention of

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[2] *See* Brief of United States Senator Mitch McConnell as *Amicus Curiae* in Support of Appellant, Wis. Right To Life, Inc. v. FEC (No. 04-1581); Brief of Senator Mitch McConnell, Missouri Republican Party, Republican National Committee, and National Senatorial Committee, as *Amici Curiae* in Support of Respondents, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (No. 98-963); Brief of Washington Legal Foundation, Fair Government Foundation, Allied Educational Foundation; U.S. Senators Alfonse M. D'Amato, Mitch McConnell; U.S. Representatives Henry J. Hyde, Bob Livingston, Joe Barton, Bob Walker; Bill Frenxel and Eugene McCarty, as *Amici Curiae* in Support of Petitioners, Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 614 (1996) (No. 95-489).

"provok[ing] a test case to overrule *Buckley* with regard to expenditure limits." Pet. App. 201a.

Act 64 includes restrictions on speech that extend well beyond what *Buckley* sanctioned. The Act limits all candidate expenditures during a two-year election cycle. Vt. Stat. Ann. tit. 17, § 2805a. The spending limits vary from $2,000 for a state representative in a single-member district to $300,000 for governor. *Id.* Incumbent spending is limited to 85-90% of these limits depending upon the office sought. *Id.* § 2805a(c). The Act defines candidate "expenditures" broadly to include "anything of value[] paid . . . for the purpose of influencing an election [or] advancing a position on a public question," *id.* § 2801(3), which even encompasses the use of a candidate's own car and telephone, and also money spent complying with the Act. Pet. App. 225a-226a, 229a-232a, 241a-242a. A candidate cannot avoid the Act's spending limits by resorting to personal funds: The Act applies equally to candidates who finance their campaigns with political contributions and to those who rely exclusively upon their own funds. Vt. Stat. Ann. tit. 17, § 2805a(a).

Act 64 considers an expenditure by any noncandidate to be "related"—and therefore attributable to a candidate's expenditure limit—where it is "intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates, if intentionally facilitated by, solicited by, or approved by the candidate or the candidate's political committee." Vt. Stat. Ann. tit. 17, § 2809(c). The Act creates a rebuttable presumption that expenditures made by a political party or PAC are "related" if they primarily benefit six or fewer candidates. *Id.* § 2809(d). The cost of rebutting the presumption is assessed against the candidate's expenditure limit, even if the candidate prevails. Pet. App. 225a-226a.

Act 64 also sharply restricts contributions to candidates from a single source, a political party, or a PAC, with limits

ranging from $200 to $400 depending upon the office sought. Vt. Stat. Ann. tit. 17, § 2805. Because Act 64's expenditure and contribution limits apply on the basis of a two-year election cycle, the limits encompass expenditures and contributions for *both* a primary and general election. *Id.* §§ 2805, 2805a. These consolidated limits apply even where a candidate has a contested primary but his general election opponent does not. *Id.*

2. This case arises from three lawsuits challenging Act 64's constitutionality. Pet. App. 24a. The plaintiffs include a sitting Vermont state legislator, individuals who plan to seek Vermont political office, political parties and PACs, individual campaign contributors, and members of the Vermont electorate. Pet. App. 50a-51a. After a ten-day bench trial in 2000, the district court upheld many of the Act's challenged provisions, but enjoined enforcement of the expenditure limits as well as the limits on contributions from political parties. Pet. App. 24a-26a.

The district court's decision was appealed by all parties to the Second Circuit, which in August 2002 issued a 2-1 opinion sustaining almost all of Act 64's challenged provisions, including its expenditure limits. Pet. App. 95a. The court subsequently withdrew its opinion and then issued another 2-1 decision that again upheld most of the challenged provisions, while remanding the case for the district court to determine whether Act 64's expenditure limits are narrowly tailored. Pet. App. 96a-97a.

Although Vermont asserted five governmental interests in support of Act 64's expenditure limits, the Second Circuit considered only the first two: Vermont's purported interests in "avoiding the reality and appearance of corruption in elective politics and government" ("the anticorruption interest") and in "assur[ing] that candidates and officeholders will spend less time fund-raising and more time interacting with voters and performing official duties" ("the time-protection

interest"). Pet. App. 145a.[3] Contending that "the *perception* of corruption was an important part" of the anticorruption interest, Pet. App. 128a (emphasis in original), the court concluded that "Vermont has proven the strength of this interest, and its relationship to unlimited campaign spending." Pet. App. 135a. The court nevertheless acknowledged this anticorruption interest was insufficient to sustain Act 64's expenditure limits because *Buckley* had "reject[ed] the anticorruption interest" in this regard. *Id.* The Second Circuit therefore expanded its inquiry to consider Vermont's time-protection interest. Noting that the "*Buckley* Court . . . alluded to this time-protection interest only in passing," Pet. App. 137a, the court deemed the time-protection interest to be compelling because "the pressure to raise large sums of money greatly affects the way candidates and elected officials spend their time." The court opined that, "without spending limits, the contribution limits would exacerbate the time problem." Pet. App. 143a.

Notwithstanding *Buckley*'s invalidation of expenditure limits, the Second Circuit concluded that when the anticorruption and time-protection interests are "considered in tandem," they are "sufficiently compelling to support [Ver-

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[3] The five interests put forward by Vermont were:

(1) "avoiding the reality and appearance of corruption in elective politics and government";

(2) "assur[ing] that candidates and officeholders will spend less time fundraising and more time interacting with voters and performing official duties";

(3) promoting "electoral competition" and "protecting equal access to political participation";

(4) "bolster[ing] voter interest and engagement in elective politics";

(5) "enhanc[ing] the quality of political debate and voters' understanding of the issues."

Pet. App. 127a.

mont's] expenditure limits." Pet. App. 144a, 145a. Because the record was inadequate to determine whether the expenditure limits are narrowly tailored, however, the Second Circuit instructed the district court on remand to resolve "whether the legislature might have chosen . . . another type of regulation . . . that would still achieve the goals we sanction and yet impinge less on the First Amendment rights of candidates and voters." Pet. App. 164a.

Turning to Act 64's contribution limits, the court concluded that these restrictions are compatible with the First Amendment because they are "closely drawn" to the anticorruption interest and comparable to "similar limits upheld in Maine and Missouri." Pet. App. 169a-170a. The court also upheld the constitutionality of Vermont's related expenditures provision, rejecting the argument that the provision is impermissibly vague and unduly restrictive of political parties' and PACs' activities. Pet. App. 181a-182a.

Judge Winter dissented from the panel majority's holding that Act 64's expenditure limits serve a compelling governmental interest and that the Act's restrictions on political parties are constitutional. Pet. App. 190a (Winter, J., dissenting). Emphasizing that "great caution is in order where incumbent legislators pass laws affecting their electoral fate," he was troubled by the panel majority's excessive deference to the Vermont legislature, which "exceed[ed] even that accorded to decisions of an administrative body." Pet. App. 206a-207a.

Judge Winter perceived that Act 64 "limits or prohibits a vast range of ordinary political activities," Pet. App. 191a, and identified the Act's adverse impact on grass-roots political activity (Pet. App. 228a), candidate speech (Pet. App. 233a), challengers (Pet. App. 245a), the press (Pet. App. 250a), and party affiliates (Pet. App. 253a). He further recognized that *Buckley* had conclusively foreclosed the use of the anticorruption interest to support expenditure limits, and

offered specific evidence from the *Buckley* record to demonstrate that the time-protection issue was also "fully before the Court in *Buckley*" and therefore had been rejected as a basis for imposing expenditure limits. Pet. App. 258a, 265a. Finally, Judge Winter objected to the narrow-tailoring remand because "vastly less restrictive alternatives"—including a system of combined public and private campaign funding—"are so obvious that a remand is unnecessary." Pet. App. 292a, 300a.

Plaintiffs petitioned for rehearing en banc, which the Second Circuit denied. *See Landell v. Sorrell*, 406 F.3d 159, 160 (2d Cir. 2005). The denial prompted four separate dissenting opinions, which were joined by a total of five judges. *Id.*[4] Three concurrences in the denial of rehearing en banc were also filed. *Id.* Notably, three of the seven judges concurring in the denial acknowledged that Act 64 is in tension with this Court's existing campaign finance precedent. *See id.* at 165, 167 (Sack and Katzmann, JJ., concurring in the denial of rehearing en banc); *id.* at 164 (Calabresi, J., concurring in the denial of rehearing en banc). Indeed, Judge Calabresi candidly acknowledged a desire to encourage this Court to revisit its holding in *Buckley* that an interest in equalizing electoral spending is not a sufficient basis for expenditure limits. *See id.* at 162, 165 (Calabresi, J., concurring in the denial of rehearing en banc) ("*Buckley*, by fiat, declared the state's explicit recognition and amelioration of wealth distribution problems in the electoral marketplace to be an insufficiently compelling interest to pass constitutional muster. . . . I believe . . . a reconsideration [of *Buckley*] to be essential.").

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[4] Because Petitioners' Appendix was produced before the final amended version of the order denying rehearing en banc was filed, it does not contain Judge Calabresi's opinion concurring in the denial of rehearing or Judge Raggi's opinion dissenting from the denial. Pet. App. 317a.

SUMMARY OF ARGUMENT

Free speech is the essence of self-government, and thus all restrictions on political speech must be subject to searching judicial scrutiny. Act 64's expenditure and contribution limits silence the speech of both voters and candidates, and therefore cannot be reconciled with *Buckley* or with the First Amendment principles on which that decision rests.

The Second Circuit's conclusion that the anticorruption and time-protection interests taken together are sufficient to support Act 64's expenditure limits flatly contradicts *Buckley*'s holding. Indeed, Vermont's alleged time-protection problem is caused by its exceedingly low contribution limits, which require candidates to approach numerous small donors to raise essential campaign funds. Because Vermont's campaign finance restrictions have generated its perceived time-protection problem, the State cannot rely upon its interest in remedying that problem to justify its expenditures limits. Moreover, as in *Buckley*, Act 64's contribution limits and disclosure provisions more than fully address any legitimate anticorruption interest Vermont may have.

In upholding Act 64's expenditure limits, the Second Circuit *sub silentio* broadened the anticorruption interest to encompass the "equalization" rationale explicitly rejected in *Buckley*. This Court should reaffirm this aspect of *Buckley* because the compelled equalization of political speech is inconsistent with the First Amendment's fundamental commitment to free and robust debate on public issues. Whereas the First Amendment promotes a competitive and uninhibited marketplace of political ideas, Act 64 subordinates this principle in favor of a vague effort to equalize the quantity of political speech among various groups.

Furthermore, Vermont's campaign finance laws embody incumbent self-protection. Act 64 cannot withstand close judicial scrutiny because it accomplishes very little of what it claims and has the principal effect of benefiting incumbents.

For example, contrary to Vermont's assumption that Act 64's contribution limits reduce the access and influence of large donors, the Act actually has the opposite effect. The most efficient way to raise funds under the Act is for candidates to pursue only those donors willing to give the maximum authorized contribution, and thus to quickly reach the low expenditure limits, which marginalizes the majority of Vermont contributors.

Ultimately, Act 64's expenditure limits, contribution limits, and related-expenditure provision are incompatible with the fundamental political freedoms guaranteed by the First Amendment, and should be invalidated in their entirety.

ARGUMENT

I. ACT 64 IS BARRED BY THIS COURT'S HOLDING IN *BUCKLEY*.

The First Amendment embodies this Court's "profound national commitment to the free exchange of ideas." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted). Nowhere is this commitment stronger than in the realm of political speech, which constitutes "the core of the First Amendment." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982). *Buckley* therefore cautioned that it "is wholly foreign to the First Amendment" to "restrict the speech of some elements of our society in order to enhance the relative voice of others." 424 U.S. at 48-49. Act 64's expenditure and contribution limits are squarely barred by *Buckley*'s admonition.

A. Act 64 Is Premised Upon Inappropriate Governmental Interests.

1. In *Buckley*, this Court considered a First Amendment challenge to provisions of the Federal Election Campaign Act ("FECA") that imposed unprecedented limitations on political contributions and expenditures. Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C.). FECA prohibited individual campaign con-

tributions in excess of $1,000 per candidate and $25,000 overall, barred individuals from independently spending more than $1,000 on behalf of a candidate, and restricted the total amount a candidate could spend in primary and general election campaigns. *Buckley*, 424 U.S. at 7.

The United States asserted three governmental interests in support of FECA's campaign restrictions. *Buckley*, 424 U.S. at 25. The "primary interest" was "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions." *Id.* The Court termed the other two interests "'ancillary' interests." *Id.* The first of these interests was "equalizing the relative ability of all citizens to affect the outcome of elections" by "mut[ing] the voices of affluent persons and groups in the election process." *Id.* at 25-26. The second was to "open the political system more widely to candidates without access to sources of large amounts of money" by curtailing the supposed "skyrocketing cost of political campaigns." *Id.* at 26.

The *Buckley* Court closely scrutinized FECA's campaign finance restrictions because the "governmental interests advanced in support of the Act involve[d] 'suppressing communication'" by "restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns." 424 U.S. at 17. Although the Court upheld FECA's $1,000 limitation on campaign contributions by individuals, it was careful to explain that it was not "address[ing] the more serious argument that these [contribution] limitations, in combination with the limitation on expenditures ... invidiously discriminate against major-party challengers and minor-party candidates." *Id.* at 31 n.33. The Court expressed concern that "the overall effect of the contribution and expenditure limitations enacted by Congress could foreclose any fair opportunity of a successful challenge." *Id.* The Court further warned that "contribution restrictions could have a severe impact on political dialogue if

the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* at 21.

Turning to FECA's expenditure limits, the Court noted that such restrictions "impose direct and substantial restraints on the quantity of political speech" and "cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations." *Buckley*, 424 U.S. at 39, 44. The Court determined that the anticorruption interest was "inadequate" to justify the Act's $1,000 limitation on independent campaign expenditures because "the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Id.* at 45-46. The Court then considered whether the "ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections" supported the $1,000 expenditure limit. *Id.* at 48. The Court squarely rejected this "equalization" rationale and emphasized that "*the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.*" *Id.* at 48-49 (emphasis added). The Court therefore concluded that FECA's $1,000 independent campaign expenditures limitation violated the First Amendment. *Id.* at 51.

The Court also invalidated FECA's limitations on candidates' overall campaign expenditures. The Court explained that the anticorruption interest was already "served by . . . contribution limitations and disclosure provisions" and that "[i]n the free society ordained by our Constitution it is not the government but the people . . . who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley*, 424 U.S. at 55, 57 (footnote omitted).

In the thirty years since *Buckley* was decided, this Court has held fast to the essential core of its holding, consistently evaluating campaign finance laws solely by their congruence with the government's anticorruption interest. *See, e.g., FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("preventing corruption or the appearance of corruption are the *only* legitimate and compelling government interests thus far identified for restricting campaign finances" (emphasis added)).

2. The Second Circuit relied upon Vermont's asserted anticorruption and time-protection interests to sustain Act 64's expenditure limitations. Pet. App. 144a. Analyzed in accordance with *Buckley*, however, the Second Circuit's attempt to bolster the anticorruption interest with Vermont's asserted time-protection interest collapses.

Vermont's time-protection interest is nothing more than a byproduct of its anticorruption interest. Indeed, if Vermont candidates do spend more than optimal amounts of time fundraising, then it is Act 64's low contribution limits that are to blame. Pet. App. 143a. In the absence of such stringent restrictions, candidates could raise necessary funds from a smaller number of donors. Because Vermont's purported time-protection problem is attributable to the contribution limits enacted in response to the State's anticorruption concerns, the time-protection interest cannot serve as an independent justification for restricting political speech.[5]

It defies logic and common sense to permit *Buckley*'s rejection of the anticorruption interest as a sufficient basis for expenditure limits to be circumvented through such legal

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[5] Instead of justifying even more speech restrictions, a time-protection problem actually indicates that contribution limits are set at unconstitutionally low levels. *See McConnell*, 540 U.S. at 135 (warning that contribution limits could be "so low as to 'preven[t] candidates . . . from amassing the resources necessary for effective advocacy'" (quoting *Buckley*, 424 U.S. at 21 (brackets in original))).

bootstrapping. *See* Pet. App. 331a (Walker, C.J., dissenting from the denial of rehearing en banc) ("Justifying a statute based on problems that the statute itself creates makes about as much sense as Baron von Munchausen's boast that he pulled himself out of a swamp by his own hair."). Vermont should not be permitted to rely upon its anticorruption interest to manufacture multiple derivative interests that, when aggregated, are ostensibly capable of supporting expenditure limits. *See* Pet. App. 336a (Jacobs, J., dissenting) ("[T]he more-restrictive expenditure limits have been enacted to mitigate the inevitable and predictable side-effects of the less-restrictive contribution limits. . . . Strict scrutiny does not tolerate such bootstrapping." (emphases omitted)).[6]

Moreover, to the extent that Act 64 actually reduces the time that candidates spend fundraising, it restricts constituents' access to their elected officials by limiting voters' opportunities to interact with candidates at fundraising events. Vermont's efforts to conserve candidates' time therefore constitute an impediment to voters' ability to meet and communicate with their elected officials.

B. The Court Should Reaffirm *Buckley*'s Rejection Of The "Equalization" Interest.

Act 64's expenditure and contribution limits make little sense when viewed as merely an attempt to prevent corruption or to conserve candidates' time. Indeed, these were not the only interests that the Act was designed to promote. The

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[6] As in *Buckley*, Vermont's anticorruption interest is more than sufficiently addressed by reasonable contribution limits combined with strict disclosure laws. *See* 424 U.S. at 55 ("The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by [the Act's] campaign expenditure ceilings."). Indeed, Vermont presented "no evidence in the record that Act 64's new low limits on contributions alone will not suffice to eliminate any improper influence." Pet. App. 266a (Winter, J., dissenting).

Second Circuit recognized that when drafting Act 64, "Vermont lawmakers were concerned with more than just the *quid pro quo* corruption that preoccupies much campaign finance reform." Pet. App. 94a. In contravention of *Buckley*, Vermont lawmakers also sought to compel the equalization of political speech. *See, e.g.*, Pet. App. 130a (asserting that "[l]arge contributions and large expenditures . . . reduce public confidence in the electoral process" (quoting 1997 Vt. Laws P.A. 64 (H. 28) (finding No. 9))). Indeed, Vermont explicitly argued below that Act 64 "protect[s] equal access to political participation." Pet. App. 127a.

In upholding Act 64, the Second Circuit evaded *Buckley*'s rejection of the equalization rationale by *sub silentio* broadening the anticorruption interest to subsume the notion of equalization. *See, e.g.*, Pet. App. 133a (considering testimony that "not every voter has the financial ability to participate" as evidence of corruption). As Judge Winter correctly recognized, both Act 64 and the Second Circuit's opinion sustaining it are premised upon the theory "that less political advocacy is better for us as a polity because too much political activity is engaged in by powerful groups." Pet. App. 279a (Winter, J., dissenting). This governmental interest in "equalizing" political speech through controlling campaign costs and restricting candidates' financial resources is a rationale that *Buckley* expressly considered and rejected.

Cutting away at the edges of *Buckley*'s equalization holding, under the guise of preventing "corruption," muddles the Court's constitutional jurisprudence and "trenches upon an area in which the importance of First Amendment protections is 'at its zenith.'" *Meyer*, 486 U.S. at 425 (citation omitted); *see also Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted that the [First Amendment's] constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.").

Buckley's holding is a fundamental reflection of our "profound national commitment to the principle" that "debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Indeed, the "right of freely examining public characters and measures, and of free communication among the people thereon, [is] the only effectual guardian of every other right." James Madison, Report on the Virginia Resolutions (1800), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 146 (Philip B. Kurland & Ralph Lerner eds., 1987).

Vermont's expenditure limits operate on the assumption that "too much" political speech undermines citizen confidence in the government. The First Amendment, however, embodies the opposite premise. As Justice Breyer has recently explained:

> [A]ctive liberty is particularly at risk when law restricts speech directly related to the shaping of public opinion, for example, speech that takes place in areas related to politics and policy-making by elected officials. That special risk justifies especially strong pro-speech judicial presumptions. It also justifies careful review whenever the speech in question seeks to shape public opinion, particularly if that opinion in turn will affect the political process and the kind of society in which we live.

STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 42 (2005). This principle has dominated our nation's understanding of political speech since its founding. *See* Madison, *supra*, at 145 ("The value and efficacy of [voting] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.").

Because political speech rests at the First Amendment's core, the government cannot forcibly equalize political speech by suppressing one group's speech in favor of another's. As this Court recognized in *Buckley*:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution *it is not the government but the people . . . who must retain control over the quantity and range of debate* on public issues in a political campaign.

424 U.S. at 57 (emphasis added; footnote omitted).

The "equalization" rationale upon which Act 64 was premised undermines the protection historically afforded to political speech and cannot be reconciled with the First Amendment's role as guardian of the political marketplace. *See Buckley*, 424 U.S. at 49 ("The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."). Indeed, the First Amendment assumes a competitive marketplace of political ideas where "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Moreover, when the role of money is reduced, media access, fame or notoriety, and the advantages inherent in incumbency become even more dominant factors in deciding elections. *See* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1078 (1996) ("attempts to exclude a particular form of power—money—from politics only strengthen the position of those whose power comes from other, nonmonetary, sources"). In fact, money often permits a challenger to overcome an incumbent's inherent advan-

tages. *See Buckley*, 424 U.S. at 56-57 ("the equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign"). With expenditure limits in place, the already well-known, who can rely upon their preexisting name recognition, are often the only candidates able to mount an effective challenge to an incumbent. As Governor Schwarzenegger's electoral success in California suggests, publicly recognizable candidates may frequently enjoy a significant advantage over their opponents. When expenditure limits are implemented, the name recognition of challengers who are widely known to the electorate as war heroes, Hollywood movie stars, or superstar athletes gains even greater significance.

Similarly, by creating a system in which "free" media would be of potentially disproportionate significance, Vermont would ensure that free media's favored candidates have an unfair advantage. Vermont would bar a candidate from buying media access to counteract the unlimited sums that media corporations can spend to promote their favored candidate. *See* Mitch McConnell, *Why Are Media Exempt?*, USA TODAY, Mar. 19, 2002, at A14 (observing that "one page of speech in USA Today could cost a private citizen, group, or candidate about $100,000").

Recognizing compelled equalization of political speech as an interest that trumps the First Amendment's protections opens the door to speech regulation that logically extends well beyond expenditure limits. *See* Mitch McConnell, *Speech Limits Are Not Reform*, USA TODAY, Feb. 26, 2002, at A13. This may not disturb some advocates of campaign finance reform; one of Vermont's defense witnesses testified at trial that the "government ought to regulate political speech the way that it regulates public utilities." Pet. App. 195a (Winter, J., dissenting). Indeed, if the "equalization" rationale is to be effectuated, the government *must* regulate politi-

cal speech the way that it regulates public utilities. Equalization of political speech can only be achieved—to the extent that it can be achieved at all—through extensive regulation and direct governmental interference clearly inconsonant with the core principles underlying the First Amendment. This Court should therefore invalidate Vermont's effort to use expenditure and contribution limits to compel the equalization of political speech.

II. ACT 64 IS AN UNCONSTITUTIONAL IMPEDIMENT TO THE ELECTORAL PROCESS.

Because campaign finance restrictions present a unique potential for incumbent entrenchment, "considerable judicial suspicion" of such laws is appropriate. Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1400 (1994). Act 64's primary effect is to insulate incumbents from effective electoral challenges, and it therefore cannot withstand judicial scrutiny.

A. Act 64's Contribution And Expenditure Limits Entrench Incumbents.

1. Incumbents have a direct, personal stake in the election laws that they enact. *See* Sunstein, *supra*, at 1400 ("Any system of campaign finance limits raises the special spectre of governmental efforts to promote the interests of existing legislators."). It is difficult to conceive of any other area of law where the self-interest of all legislators, regardless of their party affiliation, is so uniformly aligned and so inconsistent with their constituents' interests. *See id.* ("Congressional support for [campaign finance] limits is especially likely to reflect congressional self-dealing. . . . Indeed, it is hard to imagine other kinds of legislation posing similarly severe risks.").

Recognizing this, courts closely review campaign finance legislation to ensure that First Amendment principles

are not being subordinated to legislators' own interests. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) (noting that the Court "defers to empirical legislative judgments" only where "that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge"). This is especially true when legislators justify such laws on the basis of "equalizing" political speech; such a rationale is simply too far-reaching and amorphous to provide any meaningful restraint on naturally self-interested legislators. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1386 (1994) ("[S]imply turning Congress loose to promote 'equality,' without providing a reasonably precise definition of what equality is, could just lead to measures that give even more protection to political incumbents or other favored interests. In fact it would be a little surprising if it did not lead to such a result."). As Justice Breyer has explained:

> [C]ourts should not defer when they evaluate the risk that reform legislation will defeat the participatory self-government objective itself. That risk is present, for example, when laws set contribution limits so low that they elevate the reputation-related or media-related advantages of incumbency to the point of insulating incumbent officeholders from effective challenge.

BREYER, *supra*, at 49.

The risk of incumbent self-dealing reinforces the importance of subjecting expenditure limits to the "exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley*, 424 U.S. at 44-45. The Second Circuit, however, reviewed Act 64 with unwarranted deference, contending that the "review of legislation should not amount to a presumption against the fairness of spending limits simply because elected officials have an interest in the

reforms they are enacting." Pet. App. 151a; *see also* Pet. App. 207a (Winter, J., dissenting) ("I respectfully submit that my colleagues have not given this legislation careful, much less exacting, scrutiny.").

2. Even assuming, *arguendo*, that Act 64's stated objectives are constitutionally legitimate, the Act does not accomplish its purported ends. Its expenditure limits, for example, do not further Vermont's anticorruption interest. *See Buckley*, 424 U.S. at 55 ("The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by [its] campaign expenditure ceilings."). Nor does Act 64 ameliorate the time-protection problem it purports to address. Indeed, even the district court acknowledged as much. *See* Pet. App. 57a (noting that as a consequence of Act 64's low contribution limits, fundraising "will take more time and energy"). Similarly, Act 64's contribution limits are too low to correspond to any threat of actual or apparent corruption.

Act 64 is particularly effective, however, at promoting incumbency protection. This was obvious to the judges who dissented from the denial of rehearing en banc because they did not view Act 64 through the panel majority's deferential lens. Pet. App. 331a (Walker, C.J., dissenting from the denial of rehearing en banc) ("Vermont's expenditure limits (and in my view, its contribution limits) are set so low and in such a fashion that *only* a desire to protect incumbents can explain them." (emphasis added)); Pet. App. 336a (Jacobs, J., dissenting from the denial of rehearing en banc) ("the dominant but impermissible effect of the Act is to protect incumbents").

Incumbents naturally possess formidable advantages over challengers. *See* Smith, *supra*, at 1075 n.158 ("Incumbency is already the single best predictor of electoral success."). As this Court noted in *Buckley*, "it is axiomatic that an incumbent usually begins the race with significant advantages." 424 U.S. at 31 n.33. If expenditures by challengers

can be limited to a level roughly equivalent to the average spent by all candidates, the advantages of incumbency become practically insurmountable. This is illustrated by the average amounts spent by winning candidates for national Congressional office in 2000 and 2002:

Average Spending By Winning Candidates - 2000[7]

	Senate	House
All	$7,506,743	$849,158
Challenger	$8,828,989	$2,024,725
Incumbent	$4,444,501	$782,460

Average Spending By Winning Candidates - 2002[8]

	Senate	House
All	$4,812,159	$898,184
Challenger	$6,826,395	$1,595,805
Incumbent	$4,681,870	$826,942

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7 *See* OpenSecrets.org, The Big Picture, 2000 Cycle: The Price of Admission, *available at* http://www.opensecrets.org/bigpicture/stats.asp?cycle=2000 (last visited Nov. 17, 2005); OpenSecrets.org, The Big Picture, 2000 Cycle: Different Races, Different Costs, *available at* http://www.opensecrets.org/bigpicture/incad.asp?cycle=2000 (last visited Nov. 17, 2005).

8 *See* OpenSecrets.org, The Big Picture, 2002 Cycle: The Price of Admission, *available at* http://www.opensecrets.org/bigpicture/stats.asp?cycle=2002 (last visited Nov. 17, 2005); OpenSecrets.org, The Big Picture, 2002 Cycle: Different Races, Different Costs, *available at* http://www.opensecrets.org/bigpicture/incad.asp?cycle=2002 (last visited Nov. 17, 2005). Although these figures from the 2000 and 2002 elections may be somewhat exaggerated by a few self-funding challengers with disproportionately high campaign expenditures, that cannot fully account for the significant difference between successful challengers' and successful incumbents' average expenditures. *See* OpenSecrets.org, The Big Picture, 2002 Cycle: Millionaire Candidates, *available at* http://www.opensecrets.org/bigpicture/millionaires.asp?cycle=2002.

In both election cycles and both Houses of Congress, the average amount spent by winning *challengers* was significantly more than the average amount spent by winning *incumbents* and, consequently, more than the average amount spent by all winning candidates. Clearly, if incumbents wish to insulate themselves from effective challenges, they merely need to ensure that challengers are limited to spending no more than the historical average. This is exactly what Act 64 accomplishes.

Moreover, as Judge Jacobs noted, "[t]he Act further benefits incumbents because the expenditure caps are the same whether or not a candidate faces a primary contest—which of course is more frequently a hurdle for challengers than for incumbents." Pet. App. 338a (Jacobs, J., dissenting from the denial of rehearing en banc). To challengers confronted with the nearly insurmountable advantages that Vermont's expenditure limits afford to incumbents—and to voters eager to be given a bona fide choice—the marginal 10-15% spending advantage offered by Act 64 provides little solace.

Act 64's exceptionally low contribution limits further serve to entrench incumbents because low contribution limits have their greatest impact upon challengers. Incumbents can rely on their name recognition, established donor lists, and free media. In contrast, challengers not only need more money overall, but they also usually rely on a small base of large donors until they become known by the voting public. Pet. App. 261a n.23. Act 64's expenditure and contribution limits hinder electoral challenges before they have a chance to gain momentum. *See Buckley*, 424 U.S. at 31 n.33 (noting that in some situations, "the overall effect of the contribution and expenditure limitations enacted by Congress could foreclose any fair opportunity of a successful challenge"). And without vigorously contested electoral races, voters cannot meaningfully exercise their right to participate in our republican form of government.

B. Expenditure Limits Reduce Political Accountability And Marginalize Ordinary Citizens.

The Second Circuit's opinion speaks repeatedly of "[e]vidence at trial [that] overwhelmingly demonstrated that the Vermont public is suspicious about the effect of big-money influence over politics." Pet. App. 129a. This "perception of corruption" is a persistent theme in Vermont's defense of Act 64. *See* Resp. & Part. Opp'n Pet. Writ Cert. at 7 ("All of this raises the specter of corruption and its appearance in the public's mind and causes citizens to lose trust in their government and their elected representatives.").

The argument fails on two levels. First, Vermont's contention that this concern demands governmental intervention inherently discounts the voting public's ability to address potential corruption through elections. Second, when coupled with contribution limits, expenditure limits actually increase the perception of so-called "big-money influence" on politics by drastically reducing the number of donors required to fund an election. If—as both the district court and Second Circuit suggested—the Vermont public is concerned that money buys influence, expenditure limits are likely to exacerbate such concerns. As the number of donors who contribute to a candidate decreases, the influence (or perceived influence) of any single donor increases.

The First Amendment empowers informed citizens—not elected officials—to decide whether to trust candidates and to vote accordingly. Vermont's assumption that it can restrict political speech in an effort to promote trust in elected officials runs directly counter to the principles of self-government embodied in the First Amendment. *See Buckley*, 424 U.S. at 57. Under Act 64, those candidates who are also elected officials decide how much their opponents are permitted to spend. Elections are usually fiercely competitive events, and—as with any competition—the competitor who

controls the rules has an enormous advantage over the other competitors.

Moreover, Act 64's expenditure limits rest on the premise that "public involvement decreases as spending increases." Pet. App. 278a (Winter, J., dissenting). This proposition is fundamentally flawed and belied by the fact that the most heavily contested elections often involve the most spending. Experience in Vermont bears this out. Record amounts were spent on Vermont's 2000 gubernatorial election in which several divisive issues were at stake; far from alienating voters, these expenditures actually captured voters' attention, resulting in 34.5% more people voting than in the prior gubernatorial election. Pet. App. 278a (Winter, J., dissenting).

Act 64's expenditure limits also ignore the *salutary* effects of fundraising activities. Indeed, fundraising events are not only a means of gathering contributions; they are also a mechanism through which candidates solicit votes and inform voters about their positions. Moreover, as this Court recognized in *Buckley*, "the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support." 424 U.S. at 56. Expenditure limits reduce the likelihood that the "size and intensity" of support for a particular candidate will be translated into political speech. Expenditure limits thus hurt those they are purportedly designed to protect—the voters. Government rationing of campaign spending inhibits voters' ability to perceive which ideas are widely held and resonate with a majority of the electorate.

In upholding the Act, the Second Circuit emphasized Vermont's belief that candidates tend to "expend[] more effort on relatively generous contributors over less important ones." Pet. App. 144a. Vermont assumes that expenditure limitations ensure "that candidates and officeholders will spend . . . more time interacting with voters." Pet. App. 127a

(alteration in original). In reality, expenditure limits actually encourage candidates and officeholders to spend *more* time interacting with *fewer* voters. If Act 64's assumption that money buys access is correct, the use of expenditure limits in conjunction with contribution limits actually increases the access and influence of "large" contributors ("large" meaning those capable of providing the maximum allowable contribution amount) at the expense of small contributors.

This result is attributable to the fact that the vast majority of campaign donors in Vermont historically have been "small" contributors. In the elections immediately preceding Act 64's passage, for example, between 82% and 96% of all contributions were below Act 64's limits. Pet. App. 39a-40a. In the aggregate, these "small" contributions likely represented a sizable portion of a candidate's total funds and therefore were valuable to the candidate, resulting in significant access for small contributors. With the imposition of expenditure limits, there are now more contributions available than a candidate can legally utilize. The most efficient way for a candidate to reach the fundraising limit is therefore to focus exclusively on comparatively "large" contributors. Thus, contrary to expectations, the combination of contribution and expenditure limits may actually eliminate the role of Vermont's small contributors and consolidate the influence of Vermont's largest campaign donors. There is accordingly a very real danger that large contributions "may eliminate the need for, and in that sense crowd out, smaller individual contributions." BREYER, *supra*, at 44.

Vermont also failed to consider that Act 64's particular combination of contribution and expenditure limits actually exacerbates the "specter of corruption" by radically reducing the number of contributors necessary or useful to any one candidate. Pet. App. 133a, 134a. Before Act 64, a candidate was likely to have many contributors, thereby spreading the candidate's funding among a broad group of donors. Act 64 inverts this tendency, consolidating the opportunity to con-

tribute (and, under Vermont's assumption, to influence) in the hands of a few. A candidate for state representative, for example, is likely to have as few as 10 contributors (10 contributors giving the $200 maximum contribution, which equals the $2,000 spending limit). Few candidates would opt to make hundreds of calls and attend dozens of public events if they could fully fund their campaign with 10 telephone calls. Act 64 therefore creates the very problem it was purportedly designed to resolve by "requir[ing] candidates to seek and rely on a smaller number of larger contributors . . . rather than a large number of small contributors." Pet. App. 131a (quoting 1997 Vt. Laws P.A. 64 (H.28) (finding No. 5)).

Moreover, because Act 64 sharply reduces the number of contributors, it exaggerates the potential for (and appearance of) corruption from each contribution. The more donors that contribute to a campaign, the less financial influence any one donor can have on that candidate. The public perception of improper influence from any one donor is also diminished when that donor is merely one of many. Before Act 64, a $200 donor may have been the source of only a small percentage of a Vermont state representative candidate's overall contributions and likely was one of many contributors. After Act 64, the same donor will be assured of having given 10% of the candidate's campaign funds and may be one of only ten contributors.

In Federalist 10, James Madison recognized what has become a famous solution to our young republic's problem of factions (*i.e.*, special interests). Rather than attempting to remove the "causes of faction," which Madison deemed impossible without destroying the liberty "essential to political life," Madison suggested that broadening the electoral base would keep any one interest from dominating. THE FEDERALIST NO. 10, at 72 (James Madison) (Clinton Rossiter rev. ed., 2003). This "republican remedy for the diseases most incident to republican government," *id.* at 79, reflects a

political understanding that is still celebrated in the "marketplace of ideas" conception of the First Amendment.

In the same way that our republic is moderated by competing political interests, competing monetary interests "encourag[e] the public participation and open discussion that the First Amendment itself presupposes" by "broaden[ing] the base of a candidate's meaningful financial support." *Shrink Mo. Gov't PAC*, 528 U.S. at 401 (Breyer, J., concurring). In the absence of expenditure limits, politicians are encouraged to reach out to more than a bare majority of their constituents and to avoid dismissing minority interests without careful consideration. Although a politician may need only 51% of the vote, fundraising considerations ensure that the interests of more than 51% of constituents will be considered. Politicians are encouraged to seek consensus solutions that satisfy more than a simple majority. Like Madison's solution to factions, the First Amendment's prohibition on expenditure limits ensures that elected officials are not concerned only with the interests of those who elected them.[9]

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[9] Act 64's presumption that spending by parties or PACs that benefits six or fewer candidates is a "related expenditure" similarly violates the First Amendment. The presumption discourages these organizations, which are now central to the political process, from engaging in independent political speech relating to a particular issue out of concern that the Act will automatically attribute the costs of their speech to a candidate. Similarly, these organizations will hesitate to speak in opposition to a candidate from fear that the cost of their speech will be automatically attributed to that candidate's opponent—or, at any rate, that the opponent will be put to the cost of demonstrating that it should not be so attributed, all against the backdrop of Act 64's very low expenditure limits. The First Amendment does not countenance such a chilling effect on political speech.

Even more perniciously, the combination of Act 64's coordinated-expenditure presumption and its expenditure limits could be used to effectively silence an opponent's campaign. A candidate's opponents could form PACs and use those PACs to run ads "supporting" the candidate on issues that have no importance to the electorate. Under Act 64's presump-

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"Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). At best, Act 64 illegitimately subordinates this core principle of self-government in a misguided attempt to ameliorate political inequalities. At worst, Act 64 is a bald-faced example of incumbent protectionism. Either way, it cannot survive First Amendment scrutiny.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

Respectfully submitted.

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tion, the cost of the PACs' ads would automatically count toward the candidate's expenditure limit. A candidate's permissible expenditures could thus be exhausted by his adversaries. The problem is made worse because expenses in challenging the presumption would also be attributed to the candidate's expenditure limit. Pet. App. 226a.